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Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

MICHAEL DEAN RAY,

Petitioner,

v.

THE FLORIDA BAR,

Respondent.

On Petition For Writ Of Certiorari
To The Supreme Court of Florida

PETITION FOR WRIT OF CERTIORARI

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64 pp

QUESTIONS PRESENTED

In this First Amendment/lawyer discipline case, petitioner followed federal procedure and state bar rule by informing the chief federal immigration judge in three letters raising in detail that there was a substantial question as to a judge's fitness.

Based only on 83 selected words in the letters The Florida Bar asked the Florida Supreme Court to discipline petitioner for alleged misconduct. The Florida Bar alleged that the 83 words were statements that petitioner "knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge* * *".

On review the Florida Supreme Court unanimously affirmed a referee's recommendation that petitioner be publicly reprimanded, expressly declining to identify the words for which petitioner was punished. The questions presented are:

1. May a state court constitutionally abrogate or chill a lawyer's first amendment right to petition for redress and right to free speech and due process rights by:

(A) placing a new evidentiary burden on the lawyer to prove a factual basis for statements of his opinion expressed in non-public complaint letters to a supervisor about judicial misconduct?

(B) punishing a lawyer for statements critical of a judge by concluding that an "objectively reasonable factual basis" standard is to be applied to determine whether the complained of statements were false or with reckless disregard for the truth without ever examining and discussing the statements or the evidence supporting the opinion?

(C) interfering with the freedom to express candid opinions about our federal government in petitions seeking help from the federal official charged with supervision?

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

The petitioner Michael Dean Ray respectfully petitions for a writ of certiorari to review the judgment of the Supreme Court of Florida in this case.

OPINIONS BELOW

The opinion of the Supreme Court of Florida (App., *infra,* 1a- 8a) is reported at 797 So.2d 556 (Fla. 2001). The report of the referee (App., *infra,* 9a-54a) has not been reported.

JURISDICTION

The judgment of the Supreme Court of Florida was entered on August 16, 2001, and a petition for rehearing was denied on October 1, 2001. App. *infra,* 55a-56a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS AND RULES INVOLVED

U.S. Constitution, Amendment I:

"Congress shall make **no law** respecting an establishment of religion, or prohibiting the free exercise thereof; or **abridging the freedom of speech**, or of the press; **or the right of the people** peaceably to assemble, and **to petition the Government for a redress of grievances**."
(Emphasis added).

U.S. Constitution, Amendment V, in pertinent part:

"No person shall be * * *deprived of life, liberty, or property, without due process of law* * *."

U.S. Constitution, Amendment VI, in pertinent part:

"In all criminal prosecutions, the accused shall enjoy the right to * * * the Assistance of Counsel for his defense."

U.S. Constitution, Amendment XIV, in pertinent part:

"* * * No state shall make or enforce an law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deprive to any person within its jurisdiction the equal protection of the laws * * * "

Florida Rule of Professional Conduct 4-8.2:[1]

"**(a) Impugning Qualifications and Integrity of Judges or Other Officers.** A lawyer shall not make a statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge, mediator, arbitrator, adjudicatory officer, public legal officer, juror or member of the venire, or candidate for election or appointment to judicial or legal office."

Florida Rule of Professional Conduct 4-8.3:

"**(a) Reporting Misconduct of Judges.** A lawyer having knowledge that a judge has committed a violation of applicable rules of judicial conduct that raises a substantial question as to the judge's fitness for office shall inform the appropriate authority."

Title 8 of the Code of Federal Regulations § 3.9:

Chief Immigration Judge. The Chief Immigration Judge shall be responsible for the general supervision, direction, and scheduling of the Immigration Judges in the conduct of the various programs assigned to them. The Chief Immigration Judge shall be assisted by Deputy Chief Immigration Judges and Assistant Chief Immigration Judges in the performance of his or her duties. These shall include, but are not limited to:

(a) Establishment of operational policies; and

(b) Evaluation of the performance of immigration

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[1] As relevant here, Florida's Rule of Professional Conduct 4-8.2(a) echoes the language of Rule 8.2(a) of the ABA MODEL RULES OF PROFESSIONAL CONDUCT which has been enacted in some 40 jurisdictions.

Courts, making appropriate reports and inspections, and taking corrective action where indicated.

Title 8 of the Code of Federal Regulations § 208.13:

Establishing asylum eligibility.

* * * (b) *Persecution.* The applicant may qualify as a refugee either because he or she has suffered past persecution or because he or she has a well-founded fear of future persecution. * * *

(2) *Well-founded fear of persecution.* * * * In evaluating the applicant has sustained his or her burden of proving that he or she has a well-founded fear of persecution, the asylum officer of immigration judge shall not require the applicant to provide evidence that he or she would be singled out individually for persecution if:

(i) The applicant establishes that there is a pattern or practice in his or her country of nationality or last habitual residence of persecution of a group of persons similarly situated to the applicant on account of race, religion, nationality, membership in a particular social group, or political opinion; and

(ii) The applicant establishes his or her own inclusion in and identification with such group of persons such that his or her fear of persecution upon return is reasonable.

STATEMENT OF THE CASE

In this lawyer discipline case, the Florida Supreme Court has interpreted a Rule of Professional Conduct in a manner which radically eliminates First Amendment protection fo lawyers who make pure opinion statements concerning judges' qualifications or integrity. Now Florida lawyers may be cited for violating Rules of Professional Conduct if they simply make statements critical of a judge and the Florida Supreme Court "sees no error" in the burden shifting to the lawyer to establish the truth of opinion statements to escape discipline. Florida's new approach - announced for the first time in this case - rejects longstanding First Amendment jurisprudence, is at odds with the clear language of the disciplinary rule, and conflicts with cases where historically the burden of proving either falsity or reckless disregard for truth has been upon the disciplinary body.

The Florida Bar (Respondent herein) charged that Michael Dean Ray (Petitioner herein) violated Florida Rule of Professional Conduct 4.8-2(a) because in three complaint letters to the chief immigration judge he made statements that he allegedly either knew to be false or with reckless disregard to the truth or falsity concerning the qualifications or integrity of an immigration judge. The Florida Bar alleged the following text in boldface violated the Rule:

> The Review bannered this exposé of **Judge Montante's cowardly deceit** and defamation with the headline, "Immigration lawyers get evidence against judge", (Bartalk column) and reported: "In an ongoing feud between Miami immigration lawyers and immigration judge Philip J. Montante, score one for the lawyers. [Feb. 23, 1996, 2] App., *infra.*, at 10a, 18a.

The Daily Business Review headlined another story about **Judge Montante's shameless lies** to conceal what certainly appeared to be his hardhearted, unethical and immoral bias on the bench in an article entitled, "Magistrate says Justice should pay; Feds resisted efforts to release court data". [Feb. 23, 1996, 3] App. *infra.*, at 10a, 18a.

Does Judge Montante expand his concealment of evidence with cunning and guile and tampering with the official record? [Feb. 23, 1996, 3] App. *infra.*, at 10a, 20a

Montante's trial conduct towards Kolner and me (and who knows how many other attorneys afraid to speak up?) is just one more discouraging example of judicial railroads, kangaroo courts, lynchings, Inquisitions, Salem Witch Trials, Star Chambers, and Nazi Justice rearing their heads like a plague in humankind's struggle upward through history. I make this unpalatable charge simply because only you, not I, have the obligation and lawful authority to exercise that obligation to put a stop to Montante's abuses .[Nov.14, 1996, 1] App. *infra.*, at 10a-11a, 32a-33a.

This little drama exposing the **craven mendacity of Judge Phillip Montante** fits right in with your avowed goal of "engender[ing] the public respect that allows the Court system to work" - precisely why you wrote The Review for publication that none of your judges had "done anything wrong". [Aug. 19, 1997, 4] App. *infra.*, at 11a, 45a.

Judge Montante broadened his campaign of retaliation against me after The Miami Review stories exposing him as a **cowardly liar.** [Aug. 19, 1997, 4] App. *infra.*, at 11a, 45a.

The record below reflects that Mr. Ray served as the elected president of the 400-member South Florida Chapter of the American Immigration Lawyers Association ("AILA"); and for the preceding five or six years served as liaison between his AILA Chapter and the Immigration Courts in Miami.

Mr. Ray agreed that in letters complaining to the chief judge that he stated that contrary to law in asylum cases Immigration Judge Philip J. Montante, Jr. neither considered background evidence on country conditions in Haiti, nor recused himself when Ray's clients filed motions detailing their fears that the judge would not be fair.

In these disciplinary proceedings Mr. Ray set forth several defenses, ***inter alia,*** that the statements were: 1) true; 2) supported with reasonable factual basis considering their context; 3) privileged as petitions to the government for redress; and thus, 4) protected under the First and Fourteenth amendments.

The Florida Bar moved to strike ***all*** defenses ***including*** truth, and the Referee struck all defenses except: truth; reasonable factual basis considering the context; and absolute privilege.

In answer to interrogatories The Florida Bar admitted that there were *no facts* for its conclusion that Ray *knew* the complained of statements were false or that Ray made them with reckless disregard for the truth.[2] Accordingly, Mr. Ray filed a motion for summary judgment, which was denied.

At the evidentiary hearing The Florida Bar called only one

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[2] Each and every fact upon which The Florida Bar relied for its conclusion that Ray knew the complained of statements were false, are: **"Respondent's failure to advise the Florida Bar and/or the Grievance Committee of any facts upon which to conclude that those statements were true."** (emphasis added).

witness: Immigration Judge Montante who testified he *believed* that his integrity had been impugned by Mr. Ray's statements.

In his defense, Mr. Ray testified that every statement he made in his letters he believed to be true and he explained the context within which he made the statements: they were complaints to the appropriate federal supervisory official of judicial misconduct.

In support of his defense before the referee, Mr. Ray introduced the same thorough documentary evidence on Haiti's human rights situation, which evidence Judge Montante had routinely rejected in asylum cases that established that Mr. Ray had an objective factual basis for making the complained of statements. **However, the referee refused to permit the evidence to be introduced** and at one point even warned that Mr. Ray should "Try not to clutter up the record with too much exhibits" TR3-173.

Mr. Ray presented attorney Ira Kurzban[3] a leading immigration practitioner familiar both with Ray's letters and the judge's courtroom behavior, who testified that in his opinion, Ray's statements about the immigration judge were

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[3] Mr. Kurzban was the first recipient of the Tobias Simon Pro Bono Award given by the Chief Justice of the Florida Supreme Court; he litigated some 50-60 cases in the Federal and Supreme Court Reporters, argued three cases in this Court, authored ***Kurzban's Immigration Law Sourcebook: A comprehensive Outline and Reference Tool***, (6th ed. American Immigration Law Foundation 1998); taught at University of Miami School of Law and Nova Southeastern Law School for 16 years, lectured at the Harvard and Yale Law Schools, and the United States Court of Appeals Second Circuit Conference. TR2-15-18

all true.[4]

Background - Context within which Ray wrote his letters

Petitioner Ray was admitted to practice law in Florida in 1978; prior to this case he never had been disciplined by The Florida Bar nor any court. In his immigration law practice Mr. Ray represents many Haitian asylum-seekers who fled Haiti's bloody violence only to face potential deportation by the United States.

Some aliens who arrive in the United States without proper immigration documents may have hearings before the U.S. Immigration Court in the Department of Justice Executive Office for Immigration Review ("EOIR"). There, the Immigration and Naturalization Service ("INS") pursues removal proceedings before administrative immigration

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[4] The Referee asked Mr. Kurzban: **"Do you think it's worse than Nazi justice, lynch justice?" Mr. Kurzban replied:**

> **If you're asking my opinion, Judge, the answer is Mr. Montante**, in certain cases involving Haitians with certain lawyers, **never conducted himself like a Judge**, and if one expresses that like Nazi justice or would I have expressed it that way, maybe not, but **the reality is it wasn't anything like a courtroom, let me put it that way, and I'm not saying that happened in every case, but it clearly happened in cases involving Haitians and whether they had zealous lawyers representing them.** TR2-53-54 (emphasis added).

In response to the question: "In your view, these letters that Mr. Ray wrote to the Chief Immigration Judge about Montante; specifically the statements that the Bar has complained of in their Complaint of Minor Misconduct, **do you consider those statements to be true?"; Mr. Kurzban testified: "Yes, is the answer."** TR2-52-53 (emphasis added).

judges.[5] Aliens may seek relief from removal, including asylum in the United States. 8 C.F.R. § 208.1 *et seq*..

Immigration judges are selected by, and serve at the pleasure of, the Attorney General of the United States.[6] Federal Regulations provide that: "**The Chief Immigration Judge shall be responsible for the general supervision**, direction, and scheduling of the Immigration Judges* * * inspections, **and taking corrective action where indicated.**" 8 C.F.R. § 3.9 (emphasis added).

Immigration Judge Philip J. Montante, Jr. turned down asylum requests for all Mr. Ray's Haitian clients even though they all "had a strong claim like relatives being killed or their houses being burned down because of their political activities". TR2-134,140.

Mr. Ray believed that his clients were being denied fair due process hearings on their asylum claims in front of Judge Montante so he wrote letters to ask the chief immigration judge to look into – and to correct – what Mr. Ray believed was wrong. *Inter alia,* Mr. Ray complained to the chief judge:

> -- **Judge Montante always rejected Ray's attempts to introduce evidence**[7] in support of his clients' asylum

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[5] Immigration judges were not "judges" but instead were "special inquiry officers" before Congress passed the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub.L. No.104-208, § 371(a). *See:* 110 Stat. 3009, 645-646 (8 U.S.C. 1101(b)(4)).

[6] "The term 'immigration judge' means an attorney whom the Attorney General appoints as an administrative judge within the Executive Office of Immigration Review * * *") *Id.* .

[7] Judge Montante did not "allow declarations into evidence... because he said they weren't sworn to" and when it was pointed out that a Federal Statute allows declarations to be used in place of affidavits [28 U.S.C. § 1746] Judge Montante would say "thank you for that information but I'm keeping it out anyway". TR2-80

claims on the dismal human rights conditions in Haiti. TR2-73,140 even though "The evaluation of [an asylum] application requires consideration of all presently available background evidence on conditions in Haiti, since the implications of future deportation must be weighted".[8]

--Federal regulations provide that when a past "pattern and practice" of persecution is shown, asylum applicants need not show they would be singled out for future persecution,[9] nevertheless, **Judge Montante instead ruled that the "evidence is remote in time" and rejected it.** TR2-80

--When a newspaper article (which is in evidence) reported that allegations Judge Montante was not fair to Haitians were "complete and absolute nonsense" because according to his lawyer, **Judge Montante "ha[d] granted asylum to 'numerous' Haitians"**[10] "[Judge] Montante, through his attorney's office called * * * [Michael] Ray [a] 'chronic troublemaker'." *Id.*

--Because Michael Ray deemed the "chronic troublemaker[]" declaration false and defamatory, he wrote letters to Judge Montante and his lawyer demanding retraction. TR2-96-97 **Neither Judge Montante nor his lawyer retracted the "chronic troublemaker" statement or the false claim reported in the newspaper article that Judge Montante had**

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[8] *Molaire v. Smith*, 743 F.Supp. 839, 850 (S.D. Fla. 1990)(emphasis added).

[9] *See:* 8 C.F.R. 208.13(2)(i).

[10] "Immigration judge, lawyer in ongoing, ugly feud; For more than three years, hostility in and out of court" *Miami Daily Business Review* April 15, 1994.

granted asylum to "numerous" Haitians.

After Judge Montante denied asylum to one Haitian client[11], she then filed a Freedom of Information Act ("FOIA") request with the Immigration Court ("EOIR") to learn how many Haitians Judge Montante had granted asylum. The federal district court ordered EOIR to provide the information. **The truth is that when the *Daily Business Review* published that Judge Montante had granted "numerous" Haitians asylum, he had granted only one!**

Therefore, Mr. Ray had a reasonable factual basis for voicing his opinion to the chief judge concerning Judge Montante's apparent deceit, considering the nature and the context in which petitioner made the statements.

The referee's report was drafted by The Florida Bar recommending that Mr. Ray be publicly reprimanded and be ordered to pay costs. App., *infra.* 9a-14a. After review, with briefs *amici curiae* submitted in support of Mr. Ray by the American Immigration Lawyers Association, and its South Florida Chapter[12], the Florida Supreme Court approved the referee's recommendation in full. App., *infra.* 1a-8a .

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[11] The *Daily Business Review* reported about her case:

> Last month **Montante waited only seven minutes before deporting one of [Ray's] Haitian clients in absentia. The client arrived three minutes after being deported, barely after the judge stepped from the bench.** Though Montante had three hours blocked out for the hearing, he refused [her lawyer's] appeals to return to court. (Emphasis added).

[12] The Florida Bar opposed the filing of both briefs of *Amici.*

When the Federal Questions Were Raised below

This disciplinary proceeding was initiated in the Supreme Court of Florida where Mr. Ray raised the federal questions in his Answer and Affirmative Defenses to the Florida Bar's Complaint of Minor Misconduct on Jan. 12, 1999.

Specifically, Mr. Ray set forth *Garrison v. Louisiana*, 379 U.S. 64 (1964); *Bridges v. California,* 314 U.S. 252 (1941); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974); as well as the First, Fifth, Sixth, and 14th Amendments to the United States Constitution. In addition, Mr. Ray raised Article 12, and Article 19, of the Universal Declaration of Human Rights.

The Florida Bar filed a motion to strike all of Mr. Ray's defenses and in his response, Mr. Ray also set forth *In re Sawyer*, 360 U.S. 622 (1959).

With no explanation the referee granted The Florida Bar's motion to strike the First Amendment and all defenses except three.[13] Order on The Florida Bar's Motion to Strike Affirmative Defenses, April 9, 1999.

On Mr. Ray's petition for review before the Supreme Court of Florida, he again argued the federal questions.

The Florida Supreme Court explained how Mr. Ray had raised the federal questions in several arguments as to why he is not guilty of violating rule 4–8.2 (a):

> * * * all of which can be distilled down to Ray's contention that his statements were protected speech under the First Amendment and therefore this Court cannot sanction him for these statements. For the

[13] The permitted defenses were truth, reasonable factual basis considering the context, and absolute privilege under Art.I § 4, Florida Constitution.

> reasons expressed, we hold that the statements in Ray's letters were not protected speech under the First Amendment for purposes of this case because Ray did not have an objectively reasonable basis in fact for making the statements. App., *infra*, 3a.

On motion for rehearing and clarification, Mr. Ray again raised the federal questions, and included a complete appendix of evidence which for the most part was either not mentioned or improperly excluded before the referee. The federal questions were not addressed by the Florida Supreme Court in its one-sentence order denying rehearing. App. *infra*, 55a-56a.

REASONS FOR GRANTING THE PETITION

In a radical departure from nearly forty years of First Amendment jurisprudence, the Florida Supreme Court has now approved disciplinary sanctions against a lawyer simply for expressing opinions - based upon facts - which are critical of a judge. This new standard is both at odds with this Court's precedents and with other courts' interpretation of similarly-worded discipline rules.

I. The decision below that lawyers may be punished for petitioning the government and expressing non-public opinions concerning a judge's fitness conflicts with this Court's decisions in *Garrison v. Louisiana*, and *Bridges v. California*

This Court has clearly expressed that a state may not punish a lawyer for truthful criticism of a judge. This Court applied the principles of *New York Times v. Sullivan*, 376 U.S. 254 (1964) and its standards in the context of criticism of the official conduct of public officials. In *Garrison v.*

Louisiana, 379 U.S. 64 (1964), this Court reversed the criminal libel convictions of a district attorney who had made "personal attacks upon the integrity and honesty of eight judges." 379 U.S. at 76.

But the decision below implicitly rejects this Court's *Garrison* decision because "following a review of the significant differences between the interests served by defamation law and those served by ethical rules governing attorney conduct, we conclude that a purely subjective *New York Times* standard is inappropriate in attorney disciplinary actions. *See United States Dist. Court v. Sandlin*, 12 F.3d 861, 864, n. 13 (9th Cir. 1993)." App. *infra,* 4a.

However, after announcing that the standard to be applied to determine if a lawyer has violated Rule 4-8.2(a) is "whether the lawyer had an *objectively reasonable* factual basis for making the statements" App. *infra.* 4a, the decision below to the contrary adopts the referee's own *subjective* opinion: that the referee was "utterly appalled" that anyone would use this kind of language. App., *infra,* 2a, 53a.

This Court recognized an inherent First Amendment privilege to make statements complaining about a judge's "outrageous" decision in a telegram to the Secretary of Labor who is charged with official duties and therefore entitled to receive all available information, and even overturned contempt convictions for the statements:

> **For it is a prized American privilege to speak one's mind**, although not always with perfect good taste, **on all public institutions**. And an enforced silence, however limited, solely in the name of preserving the dignity of the bench, would probably engender resentment, suspicion, and contempt much more than it would enhance respect.

Bridges v. California, 314 U.S. 252, 270-71 (footnote omitted,

emphasis added).

This Court has also reiterated that the First Amendment prohibits punishment of an individual because they hold certain beliefs. ***Baird v. State Bar of Arizona***, 401 U.S. 1 (1971); quoted in ***Ibanez v. Fla. Dep't of Business & Professional Regulation***, 512 U.S. 136, 144 (1994).

It follows that if a state can not punish a person because he ***holds*** certain beliefs, then if that person ***expresses*** those same protected beliefs on a privileged occasion - as in a non-public letter of complaint to the chief judge - then the expression of those beliefs ought not to be punished.

Thus, the Florida Supreme Court has made a decision concerning a lawyer's rights to free speech and to petition the government which is in conflict with this Court's decisions in *Garrison v. Louisiana* and *Bridges v. California.*

II. The decision below: erodes lawyers' First Amendment protections for reasoned statements of opinion made concerning a judge; chills core political speech; deters reports of judicial misconduct; and conflicts with decisions of other state courts and the U.S. Court of Appeals for the Ninth Circuit

The decision below claims to base itself upon a federal case which decided that in disciplinary proceedings under substantially the same disciplinary rule it is an "objective standard" under which these cases are governed. *U.S. Dist. Ct. v. Sandlin*, 12 F.3d 861 (9th Cir. 1993).[14]

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[14] *Sandlin* was a First Amendment challenge to Washington Rule of Professional Conduct 8.2(a), which like Florida's Rule 4-8.2(a) closely tracks ABA MODEL RULE 8.2(a). The instant case differs from *Sandlin* because petitioner Ray here pursued available means of verifying his charge by obtaining information under the Freedom of Information Act before

According to *Sandlin*, the court "must determine 'what the reasonable attorney, considered in the light of all his professional functions, would do in the same or similar circumstances.'" However, **the Ninth Circuit's later ruling** in *Standing Committee on Discipline v. Yagman,* 55 F.3d 1430 (9th Cir. 1995)[15] clarified that "attorneys may only be sanctioned for impugning the integrity of a judge or court only if their statements are false: truth is an absolute defense. * * * Moreover, the disciplinary body bears the burden of proving falsity. *Philadelphia Newspapers, Inc. v. Hepps,* 475 U.S. 767 (1986)." 55 F.3d at 1438.

Thus, the decision below adopts the Ninth Circuit's earlier approach in *Sandlin*, but implicitly rejects its refined ruling in *Yagman*, which recognized as has this Court in *In Re Sawyer*, 360 U.S. 622 (1959), that "**the inquiry focuses on whether the attorney had a reasonable factual basis** for making the statements, **considering their nature and the context** in which they were made." *Standing Committee on Discipline v. Yagman,* 55 F.3d 1430, 1437 (9th Cir. 1995)(emphasis added).

Yagman also followed the Supreme Court of Oklahoma's unanimous interpretation of a disciplinary rule akin to Florida's 4-8.2(a) refusing to sanction an attorney because like

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stating his opinions about the immigration judge. However, the Ninth Circuit explained that the attorney in *Sandlin* wrongly accused a district judge of ordering his court reporter to alter the transcript of court proceedings. Though the judge had agreed to let the reporter be deposed, Sandlin did not wait to see what the deposition would disclose before making his accusation. *Yagman*, 55 F.3d at 1437 n.13.

[15] For example, *Yagman* concerned disparaging public statements made about a judge to a journalist, in an article, and in an "inte[illegible]perate" letter to the publisher of the Almanac of the Federal Judiciary. *Yagman*, 55 F.3d at 1434.

here, **"The record is devoid of any attempt to show that the statements complained of are false.** In the absence of a showing of falsity the statement must be held to be speech on vital issues of self government protected by the First Amendment." *Oklahoma Bar Ass'n v. Potter*, 766 P.2d 958, 967 (Okla. 1988) (emphasis added).

Here, as in *Oklahoma Bar Ass'n v. Potter,* the record is devoid of any evidence to show that the statements complained of are false.

Yagman was decided after *Sandlin* and Mr. Ray cited *Yagman* both to the referee and the Florida Supreme Court as well as in his motion for rehearing and clarification. Neither the referee nor the decision below acknowledged nor discussed *Yagman.*

This Court, the Ninth Circuit and the Oklahoma Supreme Court have all explained that where as here, there is a reasonable factual basis for making statements critical of the judiciary, a lawyer may not be punished simply for expressing that opinion.[16]

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[16] The leading treatise on the Model Rules of Professional Conduct, explains that Rule 8.2(a) upon which Florida's Rule 4-8.2(a) is based was enacted in part because the former disciplinary rules were unduly restrictive on lawyer's speech:

> Since judges and public law officers are public officials, statements about them cannot be prohibited unless the speaker knows them to be false or makes them with "reckless disregard" for the truth.* * *
>
> A public official may not recover in libel or slander unless there is proof that the speaker either knew the statement was false or spoke with reckless disregard for the truth. **This same stringent standard should apply to other potential sanctions (such as discipline) lest robust speech be chilled. Hence Rule 8.2(a) is limited to matters of fact that can be proven false** * * *[C]are must be taken lest proper regard for the dignity of courts and the administration of justice turn into overprotection for individual thin-skinned and imperious judges.

III. When petitioner's statements of opinion are examined in the context within which they were made it is clear petitioner was exercising the right of petition to a duly accredited representative of the United States government

This Court has emphasized that in determining whether a lawyer may be punished for speech critical of the judiciary that it is important to consider the "context" of statements. *In re Sawyer*, 360 U.S. 622 (1959).

Here, in disregard of *In re Sawyer,* the decision below neither discussed, nor expressly considered the "context" within which Mr. Ray made the statements for which he is being punished. Instead, the decision simply adopts the referee's own subjective feelings that the "evidence barely qualifies as sketchy". App. *infra,* 2a. Moreover, **whatever evidence the decision below relied upon remains unclear, since it "decline[d] to reproduce the statements here".** App. *infra,* 2a (emphasis added).

The statements which The Florida Bar complained of and for which the Florida Supreme Court punished petitioner are opinions about the federal government in petitions made to the appropriate federal official charged with taking corrective action.

Bridges v. California, 314 U.S. 252 established that such expressions of opinion are protected under the First Amendment. Moreover, it is important that such expression of opinion, even if critical of a federal judge, neither be curtailed or chilled by a state court.

G. Hazard & W. Hodes, 2 *The Law of Lawyering: A Handbook on* THE MODEL RULES OF PROFESSIONAL CONDUCT § 8.2:101, 932-35, (2d Ed. Supp. 1998)(emphasis added).

Long ago, Justice Frankfurter explained why robust debate about the courts ought not to be punished:

> Judges as persons, or courts as institutions, are entitled to no greater immunity from criticism than other persons or institutions. Just because the holders of judicial office are identified with interests of justice they may forget their common frailties and fallibilities. There have sometimes been martinets upon the bench as there have also been pompous wielders of authority who have used the paraphernalia of power in support of what they called their dignity. Therefore judges must be kept mindful of their limitations and of their ultimate public responsibility by a vigorous stream of criticism expressed with candor however blunt.

Bridges v. California, 314 U.S. 252, 289[17]

The Florida Supreme Court's punishment of petitioner for expressing his candid opinions to the federal official charged with supervision of the immigration courts will discourage and chill lawyers from reporting judicial misconduct rather than encouraging lawyers to inform the appropriate authority when there is a substantial question as to a judge's fitness for office. Such punishment by a state court simply for exercising the right to petition to our federal government and the right to free speech violates constitutional guarantees and conflicts with this Court's precedents.

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[17]Frankfurter, J.; joined by Stone, C.J. Roberts, and Byrnes, JJ. dissenting.

CONCLUSION

The petition for a writ of certiorari should be granted.
Respectfully submitted.

Neil Dwight Kolner
Counsel of Record
Liberty Building
124 South Miami Avenue
Miami, Florida 33130
(305) 377-9000

APPENDIX A

Supreme Court of Florida

No. SC94433

THE FLORIDA BAR,
Complainant,

vs.

MICHAEL DEAN RAY,
Respondent.

[August 16, 2001]

PER CURIAM.

Michael Dean Ray has petitioned for review of a referee's report recommending that he be publicly reprimanded for making certain statements regarding an administrative law judge in the United States Executive Office for Immigration Review. We have jurisdiction. See art. V, § 15, Fla. Const. Upon due consideration of the issues and defenses raised by Ray, we approve the referee's report in full.

FACTS

Ray frequently appeared before a certain immigration court judge in Miami. From February 1996 through August 1997, Ray wrote three letters to the Chief Immigration Judge in

Virginia. In these letters, Ray made several statements which questioned the veracity and integrity of the immigration judge, as well as his fairness at a hearing for one of Ray's clients.[1] Based on some of the statements made in these letters, the Bar filed a complaint of minor misconduct against Ray, alleging that he had violated Rule of Professional Conduct 4-8.2(a) ("A lawyer shall not make a statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge."). A referee was appointed and following a hearing on disputed factual and legal issues, the referee found that certain statements in the letters were false, and that Ray had made the statements with reckless disregard as to their truth or falsity:

> The letters contained accusations which are utterly false and they were made in my way of thinking at a minimum - at a minimum - with reckless disregard for the truth.
>
> Indeed, if there is one word that characterizes these letters, it is reckless.
>
> . . . I have read that transcript and I have listened to the tape and there was nothing - nothing - that transpired in that hearing that would justify such outrageously false accusations. And I am utterly appalled that this kind of language would be used against anybody on evidence that barely qualifies as sketchy.

In light of these findings, the referee recommended that Ray be found guilty of violating Rule of Professional Conduct

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[1] We decline to reproduce the statements here.

4-8.2(a), and that Ray be publicly reprimanded. Ray now petitions for review.

ANALYSIS

Ray and the amici curiae[2] in this case raise several arguments as to why Ray is not guilty of violating rule 4-8.2(a),[3] all of which can be distilled down to Ray's contention that his statements were protected speech under the First Amendment and therefore this Court cannot sanction him for these statements. For the reasons expressed, we hold that the statements in Ray's letters were not protected speech under the First Amendment for purposes of this case because Ray did not have an objectively reasonable basis in fact for making the statements.

Ray contends that the statements in his letters were his opinion and that he had a subjectively reasonable basis in fact

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[2] The American Immigration Lawyers Association and the American Immigration Lawyers Association, South Florida Chapter, filed amicus briefs on Ray's behalf.

[3] Ray also raises two additional points which merit only a brief discussion. Ray argues that the referee improperly denied his motion for summary judgment; however, the Bar proffered an affidavit in opposition which demonstrated issues of material fact, and we therefore find no error in the referee's denial of Ray's summary judgment motion. See generally Smith v. Harr, 571 So.2d 575, 577 (Fla. 5th DCA 1990) (affidavit in opposition to summary judgment motion "need only raise a material issue of fact to survive the motion," and "[a]ll inferences, doubts, and conclusions must be construed in favor of the party opposing summary judgment"). Ray also argues that the burden of proof was improperly shifted to him to substantiate his statements. However, there is no debate that the statements at issue concerned "the qualifications or integrity of a judge," R. Regulating Fla. Bar 4-8.2(a), and we see no error in the burden then shifting to Ray to provide a factual basis in support of the statements.

for making the statements. Subsumed in this argument is Ray's contention that the standard for defamation cases announced in *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), applies in attorney disciplinary proceedings in Florida. Although the language of rule 4-8.2(a) closely tracks the subjective "actual malice" standard of *New York Times*, following a review of the significant differences between the interests served by defamation law and those served by ethical rules governing attorney conduct, we conclude that a purely subjective *New York Times* standard is inappropriate in attorney disciplinary actions.

The purpose of a defamation action is to remedy what is ultimately a private wrong by compensating an individual whose reputation has been damaged by another's defamatory statements. However, ethical rules that prohibit attorneys from making statements impugning the integrity of judges are not to protect judges from unpleasant or unsavory criticism. Rather, such rules are designed to preserve public confidence in the fairness and impartiality of our system of justice. *See Kentucky Bar Ass'n v. Waller*, 929 S.W.2d 181, 183 (Ky. 1996) (disrespectful language directed at judge is not sanctioned because "the judge is of such delicate sensibilities as to be unable to withstand the comment, but rather that such language promotes disrespect for the law and for the judicial system"), *cert. denied*, 519 U.S. 1111 (1997). Because members of the Bar are viewed by the public as having unique insights into the judicial system, the state's compelling interest in preserving public confidence in the judiciary supports applying a different standard than that applicable in defamation cases. For this reason, we, like many other courts, conclude that in attorney disciplinary proceedings under rule 4-8.2(a), the standard to be applied is whether the attorney had an objectively reasonable factual basis for making the

statements. *See United States Dist. Court v. Sandlin*, 12 F.3d 861, 864, n. 13 (9th Cir. 1993) (rejecting purely subjective defamation standard and applying objective standard, requiring court to determine whether the attorney had a reasonable factual basis for making the statements); ***In re Holtzman***, 577 N.E.2d 30 (N.Y.) (declining to adopt subjective New York Times standard in attorney disciplinary proceeding regarding statements critical of judiciary, as doing so "would immunize all accusations, however reckless or irresponsible, from censure as long as the attorney uttering them did not actually entertain serious doubts as to their truth") ***cert. denied***, 502 U.S. 1009 (1991); ***In re Graham***, 453 N.W.2d 313, 322 (Minn.) (standard in disciplinary proceedings involving criticism of judiciary "must be an objective one dependent on what the reasonable attorney, considered in light of all his professional functions, would do in the same or similar circumstances"), ***cert. denied***, 498 U.S. 820 (1990).

The referee in the instant case heard evidence from both the Bar and Ray regarding whether Ray had a reasonable basis in fact to make the statements he made in his letters and determined that Ray did not. Ray's statements that questioned the judge's veracity were found by the referee to be based on statements that the judge never made, and the referee concluded that it was impossible to "call someone a liar for a statement they never made." As to Ray's allegations of the judge's unfairness at a hearing for one of Ray's clients, the referee, after reviewing a tape recording and a transcript from the hearing, found that there was "nothing that transpired in that hearing that would justify such outrageously false accusations," and that the evidence Ray relied upon in making the statement "barely even qualifies as sketchy." The referee

concluded that Ray's statements were made "with a reckless disregard for the truth."

Although Ray urges this Court to reweigh the evidence presented to the referee and determine that his statements are opinions which had a reasonable basis in fact, we have reviewed the entirety of the record, and conclude that the referee's findings in this regard are supported by competent substantial evidence. See Florida Bar v. Herzog, 521 So.2d 1118, 1119-1120 (Fla. 1988) ("Although there was conflicting testimony concerning each of the disputed issues, `the referee, as our fact finder, properly resolves conflicts in the evidence.' . . . Findings of fact will be upheld unless they are without support in the record or clearly erroneous."). We therefore approve the referee's findings that Ray made the statements in his letters with reckless disregard as to their truth or falsity. See Florida Bar v. Clark, 528 So.2d 369, 372 (Fla. 1988) (lawyer sanctioned under former Disciplinary Rule 8-102(B) "not for exercising his right to criticize the judiciary but for making false and unsubstantiated charges against the judiciary"). Ray and the amici also contend that Ray's letters to the Chief Immigration Judge were an accepted manner in which to seek redress when an attorney is having difficulties with an immigration judge. Amici also express concern that this method of expressing criticism of the judiciary will be severely limited if the referee's recommendations here are approved. We disagree. Our resolution of this case does not limit an attorney's legitimate criticism of judicial officers; we simply hold that an attorney must follow the Rules of Professional Conduct when so doing. Although attorneys play an important role in exposing valid problems within the judicial system, statements impugning the integrity of a judge, when made with reckless disregard as to their truth or falsity, erode public

confidence in the judicial system without assisting to publicize problems that legitimately deserve attention. See State ex rel. Oklahoma Bar Ass'n v. Porter, 766 P.2d 958, 969 (Okla. 1988) ("Members of the Bar possess, and are perceived by the public as possessing, special knowledge of the workings of the judicial branch of government. Critical remarks from the Bar thus have more impact on the judgment of the citizen than similar remarks by a layman would be calculated to have.").

In light of the above, we approve the referee's recommendation as to guilt, and conclude that the referee's recommendation of a public reprimand has a reasonable basis in existing caselaw. See Florida Bar v. Graham, 679 So.2d 1181 (Fla. 1996); Florida Bar v. Flynn, 512 So.2d 180 (Fla. 1987) (decided under former Disciplinary Rule 8-102(B)). We therefore approve the referee's recommended discipline.

CONCLUSION

Michael Dean Ray is hereby publicly reprimanded, and his reprimand will be accomplished by publication of this opinion in the Southern Reporter. Judgment is entered for The Florida Bar, 650 Apalachee Parkway, Tallahassee, Florida 32399, for recovery of costs from Michael Dean Ray in the amount of $2,303.86, for which sum let execution issue.

It is so ordered.

WELLS, C.J., and SHAW, HARDING, ANSTEAD, PARIENTE, LEWIS, and QUINCE, JJ., concur.

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION, AND IF FILED, DETERMINED.

Original Proceeding - The Florida Bar

John F. Harkness, Jr., Executive Director, and John Anthony Boggs, Division Director, Tallahassee, Florida; and Randi Klayman Lazarus, Bar Counsel, Miami, Florida,
for Complainant

Neil D. Kolner, Miami, Florida,
for Respondent

Tammy Fox-Isicoff, Committee Representative, Miami, Florida,
for American Immigration Lawyer's Association, South Florida Chapter, Amicus Curiae

Jonathan P. Rose, Miami, Florida,
for American Immigration Lawyers Association, Amicus Curiae

APPENDIX B

IN THE SUPREME COURT OF FLORIDA
(Before a Referee)

THE FLORIDA BAR, Complainant, v.	Supreme Court Case No. 94,433
MICHAEL DEAN RAY, Respondent. _____/	The Florida Bar File No. 98-70,862 (11K)

REPORT OF REFEREE

I. SUMMARY OF PROCEEDINGS: Pursuant to the undersigned duly appointed as Referee for the Supreme Court of Florida to conduct disciplinary proceedings as provided for by Rule 3-7.5 of the Rules Regulating The Florida Bar, a Final Hearing was held on June 17, 1999, August 2, 1999, August 4, 1999, and August 10, 1999. All of the pleadings, transcripts, notices, motions, orders and exhibits are forwarded with this report and the forgoing constitutes the record of the case.

The following attorneys appeared as counsel for the parties:

For The Florida Bar:	Randi Klayman Lazarus Suite M-100, Rivergate Plaza 444 Brickell Avenue Miami, Florida 33131 (305) 377-4445
For the Respondent:	Neil D. Kolner 124 South Miami Avenue

Liberty Building
Miami, Florida 33130-1605
(305) 377-9000

II. FINDINGS OF FACT AS TO EACH ITEM OF MISCONDUCT OF WHICH THE RESPONDENT IS CHARGED: After considering The Florida Bar's complaint this Referee finds that all facts are true as stated in The Florida Bar's complaint to wit:

1. Respondent is and was at all times material herein a member of The Florida Bar subject to the jurisdiction and disciplinary rules of the Supreme Court of Florida.

2. Respondent is an attorney who has appeared frequently before Immigration Court Judge Phillip J. Montante.

3. In a February 23, 1996 letter to Chief Judge Michael J. Creppy, respondent included the following language:

a. "...Judge Montante's cowardly deceit" (page 2).

b. "...Montante's shameless lies..." (page 3).

c. "Does Judge Montante expand his concealment of evidence with cunning and guile and tampering with the official record?" (page 3). (Attached hereto and incorporated herein as Exhibit "A" is a copy of respondent's letter dated February 23, 1996 to Judge Creppy).

4. In a November 14, 1996 letter to Chief Immigration Judge Michael J. Creppy, respondent referred to his and his associates' disputes with Judge Montante in the following manner:

> Montante's trial conduct toward Kolner and me (and who knows how many other attorneys afraid to speak up?) is just one more discouraging example of judicial railroads, kangaroo courts, lynchings, inquisitions. Salem Witch Trial Star Chambers, and Nazi Justice rearing their heads like a

plague in humankind's struggle upward through history. (page 1).

(Attached hereto and incorporated herein as Exhibit "B" is a copy of respondent's letter dated November 14, 1996 to Judge Creppy).

5. In an August 19, 1997 letter to Chief Judge Michael J. Creppy, respondent included the following language"

a. "...craven mendacity of Judge Phillip Montante ..." (page 4).

b. "...cowardly liar.." (page 4).

(Attached hereto and incorporated herein as Exhibit "C" is a copy of respondent's letter dated August 19, 1997 to Judge Creppy).

6. Respondent either knew those statements in his letters dated February 23, 1996, November 14, 1996 and August 19, 1997, a set forth in paragraphs 3, 4, and 5, to be false or stated them with reckless disregard to their truth or falsity.

Based upon the foregoing, respondent is in violation of Rule 4-8.2(a) (Impugning qualifications and integrity of judges or other officers. A lawyer shall not make a statement that the lawyer knows to be false or with reckless disregard to its truth or falsity concerning the qualifications or integrity of a judge, mediator, arbitrator, adjudicatory officer, public legal officer, juror or member of the Venice, [sic] or candidate for election or appointment to judicial or legal office) of the Rules of Professional Conduct.

III. <u>RECOMMENDATION AS TO GUILT:</u> I recommend that the respondent be found guilty of the following violations, to wit:

Respondent has violated Rule 4-8.2(a) Rule 4-8.2(a) (Impugning qualifications and integrity of judges or other

officers. A lawyer shall not make a statement that the lawyer knows to be false or with reckless disregard to its truth or falsity concerning the qualifications or integrity of a judge, mediator, arbitrator, adjudicatory officer, public legal officer, juror or member of the venire, or candidate for election or appointment to judicial or legal office) of the Rules of Professional Conduct.

IV. RECOMMENDATION AS TO DISCIPLINARY MEASURES TO BE APPLIED: It is my recommendation that the respondent receive a public reprimand The basis for this recommendation has been set forth, in part, in the attached excerpt of my findings at the conclusion of the final hearing on August 10, 1999. (Attached hereto and incorporated herein as Exhibit "D" is an excerpt of the August 10, 1999 final hearing.) I find the following case law to be applicable:

The Florida Bar v. Clark, 528 So.2d 369 (Fla. 1988);
The Florida Bar v. Nunez, 734 So.2d 393 (Fla. 1999);
The Florida Bar v. Weinberger, 397 So.2d 661 (Fla. 1981); and
The Florida Bar v. Flynn, 512 So.2d 180 (Fla. 1987).

I find the following sections of the Florida Standards for Imposing Lawyer discipline to be applicable: Standard 7.2 and Standards 9.2(g) and (i).

V. PERSONAL HISTORY AND PAST DISCIPLINARY RECORD:

Age: 42

Date Admitted to Bar: 12/05/78
Prior disciplinary record: None

VI. STATEMENT OF COSTS AND MANNER IN WHICH COSTS SHOULD BE TAXED:

I find the following costs were reasonabl incurred by The Florida Bar.

Administrative fee	$ 750.00
Bar counsel's costs	50.91
Court Reporter's attendance at Referee hearing held on March 30, 1999	60.00
Court Reporter's attendance and transcription of Referee hearing held on May 25, 1999	187.75
Court Reporter's attendance and transcription of respondent's deposition held on May 27, 1999	393.05
Court Reporter's attendance at Referee hearing held on June 15, 1999	60.00
Court Reporter's attendance and transcription of final hearing held on June 17, 1999	410.40
Court Reporter's attendance at final hearing held on August 2, 1999	120.00
Court Reporter's attendance at final hearing held on August 4, 1999	120.00

Court Reporter's attendance and partial transcription of final hearing held on August 10, 1999	91.75
TOTAL:	**$2,303.86**

Dated this 8th day of October, 1999.

s/_____
GERALD D. HUBBART,
Referee
175 N.W. 1st Avenue
Miami, Florida 33125

Copies to:
Randi Klayman Lazarus, Bar Counsel
Neil D. Kolner , Attorney for Respondent
John A. Boggs, Staff Counsel

Michael D. Ray
Lawyer

Penthouse I
U.S. Justice Department Building
155 South Miami Avenue
Miami, Florida 33130
Telephone (305) 377-9000
Fax (305) 377-9100

February 23, 1996

Michael J. Creppy, Chief Immigration Judge
Executive Office for Immigration Review
Office of the Immigration Judge
5107 Leesburg Pike
Falls Church, VA 22041
CERTIFIED RETURN RECEIPT #P 121 458 505

Re: **Retaliation by the Miami Immigration Court must stop**

Dear Judge Creppy:

Again I am faced with the unpleasant and time-consuming task of asking you to stop the willful, wanton, habitual violation of EOIR federal regulations and Constitutional due process and rude, insulting, malicious attacks against lawyers Neil Kolner and me indulged in by a certain few Judges of the Miami Immigration Court (hereafter, MIC). Specific facts proving my allegations are spelled out below. I am shocked that my first complaint of such conduct to you by Judge Nancy

EXHIBIT
"A"

McCormack (my letter of 12-14-95) has been met not with any improvement but with a spreading cancer of retaliation. **What nourishes this cancer upon the Court?** The standard scenario. Lawyer Kolner and I believe it is our duty to challenge partiality by a Judge if and when the rare judge displays it. Only a few judges have been involved so far: Montante, McCormack, Williams and Sandron, who misconstrue such a challenge as an assault on the integrity of the court, and act accordingly. Such judicial reaction is absolutely wrong according to a recent decision of the United States Court of Appeals for the Fifth Circuit, which was cited by The Florida Bar to your Judge McCormack when the Bar dismissed her frivolous complaint against lawyer Kolner.

Several attorneys have praised me for standing up to what they call a few arbitrary and capricious judges, but have expressed their fear of doing likewise because they lack the time, resources and record of litigation victories against the U.S. Department of Justice as Kolner and I to combat the likely retaliation. Similarly, even court personnel have expressed admiration for our battles against injustice for the underdog, noting that all the other immigration lawyers "roll over and play dead", and that Kolner and I are the only ones who fight for their clients and their rights under the law.

From the sad record which follows of what a few judges of the MIC have done, it appears that the fear of retaliation by other attorneys if they dared challenge the court's perceived partiality was well taken. I ask you as the Chief Judge to stop it now before it gets totally out of hand. If the chronology below is largely foreign to you, reading it should shed light on the problem with which you must deal. It will not go away. I will not go away. Therefore, the conduct unbecoming a judge

indulged in by the four MIC judges named above must go.

HISTORY & BACKGROUND OF MIAMI IMMIGRATION COURT/RAY/KOLNER CONFLICT

1. Consistently, regularly and systematically, four MIC Judges refuse to follow the law.

Libel & slander against Ray & Kolner in the press by MIC Judge Philip Montante (4-15-94). As published in the *Daily Business Review*, "[Judge] Montante, through his attorney's office, called Kolner and Ray 'chronic troublemakers' who are 'part of Kurzban's group'". In context, Montante's remarks were his public defense to a *Review* reporter against two events. One was a *Review* headline, "Immigration Judge, lawyer in ongoing, ugly feud; for more than three years, hostility in and out of court", referring to nationally prominent immigration author, lawyer and lecturer Ira Kurzban's civil lawsuit against MIC Judge Montante for libel, slander and defamation. p.A8 Secondly, Montante was responding to a charge published in the *Review*, "Neil D. Kolner & Michael D. Ray have sought to disqualify Montante claiming Montante won't admit certain evidence regarding oppressive conditions in Haiti... Judge Montante does not consider evidence in asylum cases that he's required by law to consider", Ray said.

Judge Montante lies to press and defames lawyers Ray & Kolner to cover his judicial wrongdoing (05-12-95). The *Review* has published a number of stories about its concern that Haitians are not getting a fair shake in MIC and reported that Ray and Neil Kolner, representing a Haitian political asylum seeker, "tried to get Montante recused from her case...

saying he wouldn't consider background information on the tense political situation there. And that left her fearing he was biased against her.

"'Nonsense', responded a lawyer for Montante"... who told the *Review* reporter the judge "had granted asylum to numerous Haitians". That was in April, 1994.

"Seeking to test that assertion , Ray and Kolner asked for, and then sued for, information on how many asylum requests Montante granted in his five years on the immigration bench in Miami. They won, and the answer came back two weeks ago." Montante had granted but one Haitian asylum at the time his attorney told *The Review* he "had granted asylum to numerous Haitians."

The *Review* bannered this exposé of Judge Montante's cowardly deceit and defamation with the headline, "Immigration lawyers get evidence against judge", (Bartalk column) and reported: "In an ongoing feud between Miami immigration lawyers and immigration judge Philip J. Montante, score one for the lawyers."

MIC and EOIR, contrary to federal law, hid appalling information damaging to Judge Montante. The *Daily Business Review* headlined another story about Judge Montante's shameless lies to conceal what certainly appeared to be his hardhearted, unethical and immoral bias on the bench in an article entitled, "Magistrate says Justice should pay; Feds resisted efforts to release court data":

> A federal magistrate has recommended that two Miami lawyers who bested an immigration judge get their fees and costs from the Justice Department...
>
> In March 1994, Ray and Kolner tried to persuade Montante to recuse himself from Belvy's case because he would not consider evidence of the tense political

situation in Haiti. Montante ordered Belvy deported in absentia when she was seven minutes late to a hearing. Though she arrived three minutes after he deported her, Montante would not hear the case.

Belvy claimed bias, which Montante's then-lawyer John McCluskey denied. So Kolner and Ray made a FOIA request to the Justice Department's Executive Office of Immigration Review to find out how other Haitians had fared in Montante's hearing room.

When the office [EOIR] resisted turning over the information, the lawyers sued. After battling the government every step of the way, they got it in May.

What Kolner and Ray found was that prior to ordering Belvy's deportation, Montante had granted only one Haitian asylum in five years. . .

To get the fee award, Belvy had to show the public benefit of releasing the documents outweighed the government's justification for withholding them.

Bandstra found the government "failed to put forth a compelling reason for its nonproduction of documents throughout the entire process of this case". Releasing the information "increased awareness of decisions made on Haitian immigration decisions."

. . .

A call to the immigration review office was not returned. Montante refused to comment, saying he is not allowed to talk to the media.

Ray said the outcome "significantly raises the question as to whether he's dealing with these clients fairly, and in Belvy's case it certainly indicates that he was not".

Daily Business Review (Dec. 15, 1995), B1, B4.

Does Judge Montante expand his concealment of evidence with cunning and guile and tampering with the official record? All records of a pending hearing mysteriously disappeared from the Miami EOIR computer. In mid-1994 we filed a motion to recuse which is still pending. Each time we asked the clerk for the file she told us Judge Montante had the file in his chambers and that we were not allowed to see it. After repeated discussions with the clerk's office we discovered that the hearing did appear on the Central computer for EOIR, if not on the Miami EOIR computer! Suddenly and mysteriously, a hearing in the same case was bizzarely rescheduled eight months in the future, August, 1996. Voilà!

MIAMI IMMIGRATION COURT'S UNLAWFUL RETALIATION AGAINST LAWYERS RAY & KOLNER

MIC Judge Nancy McCormack files frivolous complaint against lawyer Kolner with The Florida Bar. 11-8-95. Miami Immigration Court Judge Nancy McCormack filed a formal complaint against lawyer Neil D. Kolner because he had argued in an appropriate legal proceeding that "Judge McCormack has a bias or prejudice". As of that time, McCormack had recused herself seven times from cases involving Kolner. The Florida Bar dismissed McCormack's complaint, pointing out that "Lawyers should be free to challenge, in appropriate legal proceedings, a court's perceived partiality without the court misconstruing such a challenge as an assault on the integrity of the court."

Harassment of Kolner & clients by Judge McCormack.

The judge routinely exposed Kolner's clients to the risk of deportation back to their bloody homeland where torture, beatings, killings, and amputation of limbs was a probable occurrence for many backwoods supporters of Aristide even after occupation by U.N. troops. She did her dirty deed in the following manner. When McCormack would recuse herself it often was done verbally in front of a room full of lawyers and others at a master calendar hearing in which the judge refused to go on the record as required by 8 C.F.R. § 236.1(e) and § 242.15 (1995). Instead, the judge would tell the clerk in front of everyone to tell me or Kolner that she would be entering an order of recusal which would be sent to us in the mail. When either of us would ask the Judge to go on the record at least to reflect that our client had appeared, she would refuse despite the law requiring her to do so. Incredibly, McCormack would state in newspeak that she was calling our case first in order to accommodate our client. If the Judge really were trying to accommodate the clients she would have entered a blanket order of recusal as I requested so that the clients would not have to gather witnesses, take time off from work, and often drive from out of town in rickety cars to come to court for nothing. McCormack refused. And I never received the orders by mail as promised. I always had to go pick them up myself at the Clerk's office. Meanwhile, with the lack of any evidence of the client's appearance in the record, the client was exposed to the chance of being picked up and deported.

Chief Immigration Judge swept allegations of judicial misconduct under the rug. 12-14-96. Prior to learning about McCormack's Bar complaint against Kolner, Ray felt compelled to write the Chief Immigration Judge in Washington (regarding Judge McCormack) a "request for removal as EOIR hearing officer for misconduct by her willful,

wanton, habitual violation of EOIR Rules and Constitutional due process; and for rude, insulting malicious attacks upon counsel." Ray's three-page letter described with specificity the facts upon which he relied for his request. It would be fair to characterize the Chief Judge's answer as a complete stonewall (in the Nixonian sense).

Does MIC and EOIR compile and maintain secret dossiers on lawyers appearing before it? 01-04-96. Since The Florida Bar would not act in concert with the MIC to "get" lawyer Kolner on trumped up charges supplied by Judge McCormack, Judge Keith Williams apparently decided to do it in-house and brazenly wrote a concocted complaint against Kolner to the Chief Judge repeating essentially the same discredited complaint Judge McCormack had made to The Florida Bar with added elements,

> This will serve to notify the office of the Chief Immigration Judge of yet another problem with Mr. Kolner experienced by a judge in Miami... As the transcript will show, Mr. Kolner disagreed with my ruling... he chose to argue with me about it, to the point of preventing me from going forward with the scheduled hearing. In doing so he demonstrated his disrespect for the Court... I am forced to recuse myself from further conduct of this case, as so many other judges have had to do with Mr. Kolner's cases...

Judge Williams' complaint contained errors of fact which he knew or should have known were false, thus it is fair to call his complaint malicious.

"I don't need to put up with this shit": MIC Judge Williams leaving the bench; what Judge Williams did not report. The sworn declaration of an observer at the hearing paints a different picture from that presented by Judge Williams:

> When Attorney Kolner stated that other Immigration Judge's customarily resolved the [exclusion] issue before hearing the applicant's asylum claim, Judge Williams stated that he was the senior Immigration Judge in Miami and considered himself to be a far better judge than his colleagues... While Attorney Kolner was stating his objection to the Immigration Judge's decision... the Immigration Judge abruptly and unexpectedly stated that the hearing was over, turned off the tape recorder, and left the bench.... Before Judge Williams had left the courtroom, he turned to the room and my notes reflect that he stated, "I don't get paid these days, I don't need to put up with this shit"... Attorney Kolner was at all times respectful to the Court, and he appeared to be attempting to prevent what could be considered irreversible error on the part of the Immigration Judge.

What makes Judge Williams' harassment even more obvious is the fact that in the past he has also required the government to attempt to prove its charges before going to the merits of any asylum claim.

Way cleared for civil defamation lawsuit against MIC Judge Williams 01-17-96. Attorney Kolner wrote Judge

Williams a Demand for Retraction of what he called false, malicious and damaging remarks to his reputation made by Judge Williams in his 01-04-96 request to the Chief Judge "for whatever action is appropriate" against Kolner. Williams alleged that "so many other Judges" had had to remove themselves from Kolner's cases. In fact, at that time there had only been one other sua sponte recusal for bias and/or prejudice - by Judge Nancy McCormack, who had submitted the frivolous Bar complaint against him.

An unusual meeting of the Miami Immigration Court Judges (01-22-96) attended by the Assistant Chief Immigration Judge, Brian O'Leary, was held in Judge Williams' courtroom which prevented a previously scheduled hearing for 9:00 a.m. for a client of Kolner's until 9:30. At the hearing immediately afterwards Judge Williams stated he would recuse himself from cases involving Kolner and Ray because of Kolner's threat to sue him.

Chief Immigration Judge has written Kolner an intimidating letter (01-23-96) because of what he calls Kolner's "conduct, including gestures, tone of voice and body language in the courtroom, as evincing a contemptuous attitude toward the court" and rather "than initiate disciplinary proceedings" has asked two Judges to meet Kolner "to discuss the concerns expressed by the Miami Immigration Court". Pointedly, the Chief Judge said not a whit about the far more serious concerns expressed by me about Judge McCormack. While the letter bears a postal meter strip date of 01-23-96, the day after the meeting of the Miami Immigration Court, however, the letter itself is dated 01-18-96!

EOIR secretes evidence, defies federal statute and is sued again. 01-23-96. Coupling the big meeting of the MIC to the intimidating letter from the Chief Immigration Judge and his

refusal to give any meaningful reply to Ray's complaint against Judge McCormack, Kolner sensed that the Immigration Court may be getting together to go after him with more false, frivolous, or defamatory charges like those described above. Since Judge McCormack's Bar Complaint had failed to do the trick, it was reasonable to consider whether the MIC was preparing another attempt to accomplish its ulterior motives, and take another try to frame him. Kolner filed a Freedom of Information Act (hereafter, "FOIA") request to the office of EOIR asking for any documents wherein Kolner was mentioned as an issue or subject discussed. The FOIA request had not been answered in the 10 days within which federal law requires an answer and still had not been answered on 02-13-96. Thus Kolner was left with no alternative but to file yet another FOIA lawsuit against EOIR. *See Kolner v. U.S. Dep't of Justice, EOIR,* (S.D. Fla. Case No. 96-0367-CIV-MOORE).

MIC Judge Sandron closes public hearing, ejects lawyer, publicly berates lawyer for asking him to recuse himself, refuses to recuse, adjourns hearing, and 2 days later recuses himself *sua sponte*! 01-31-96. At a hearing before Immigration Judge Ira Sandron where both Kolner and Ray appeared, the judge began the hearing by announcing after he turned off the tape recorder that he was only allowing one member of the public to attend the hearing, and then intimidated Kolner and Ray's secretary to the point that she fled from his courtroom. When the Judge turned on the recording equipment Kolner attempted to note on the record that federal law made the hearing open to the public. The judge became highly agitated, interrupted Kolner and prevented him from making a proper record. Then the judge ordered Ray to retrieve the "witness", the secretary who was not a witness, and harangued Kolner accusing him of yelling.

Ray replied the record should show that the Court was the only one who had raised his voice. Then in an agitated voice the Judge announced to Kolner and Ray, "You have problems with other judges here, and I'm not going to be intimidated". When Ray responded that the problem seemed to be with this court, Judge Sandron fired back, **"Mr. Ray, please leave or I'll have you thrown out of here. I'll call the guards and have you removed". Then, inexplicably, he told Ray he could stay** but picked up the phone, cupped his hands over his mouth and said into the phone, "Be advised you may be called". Kolner tried to make a motion, but the Judge kept interrupting him and thus censored Kolner. Finally, Kolner was allowed to make his motion to recuse, which was denied. A few days later, Judge Sandron flip-flopped and mailed an Order of Recusal "sua sponte", once again full of false and familiar vague and almost wild grounds for the Court's recusal: "The Court considers Respondent's counsel's conduct to have been disrespectful, disruptive, and/or dilatory[!], and so denigrating of the proceedings and, by implication, the Attorney General of the United States, that to continue further would put the Court in an untenable position."

Let's get this woman adjusted "for Christ's sake" explodes Judge Williams from the bench (with the tape recorder off again?) before accusing me of being "obstructive" and "obstreperous". 2-13-96. Although Judge Williams recused himself on 1-22-96 because of Kolner's demand for retraction and assured us both then that he would recuse himself from cases involving Kolner and me, Judge Williams nevertheless required that I and my client appear before him on 2-13-96 for a hearing. He began the hearing without turning on the tape recorder but did honor my request to do so. He denied his

assurances of 1-22-96 that he would recuse himself on cases such as this and refused to do so (2-13-96) even though the same reasons he recused on 1-22-96 still existed! The courtroom was packed. In response to his question why should he recuse I additionally reminded him that his false and defamatory statements against Kolner had not been retracted. To the crowd, Judge Williams announced that he had uttered no falsehoods, giving proof that he was indeed prejudiced. How could any reasonable person conclude otherwise? Without recusing himself, he ordered the client and me to appear again the following day before a different judge, but not before accusing me of being "obstructive and obstreperous". But not even that harassment ended the fruitless but costly appearances because the trial attorney was not prepared the next day, so we must all waste more time.

CONCLUSION

Badge and trail of retaliation by MIC shown above. The above chronology of events seems to paint a pretty clear picture of a pattern and trail of retaliation against Kolner and Ray by a few judges of the Miami Immigration Court, a badge of retaliation, if you will. All for lawful challenges of what is perceived to be the court's partiality. *United States v. Kidd*, No. 95-30022 (5th Cir. Dec 19, 1995). If not published yet, you may get a copy from Judge Nancy McCormack who was mailed a copy for her guidance by The Florida Bar to explain to her why they were dismissing her complaint against Kolner.

Grievous economic harm to Ray and Kolner by MIC. This retaliation has required two attorneys from my office to attend hearings in the Immigration Court for obvious reasons. Answering the sometimes scurrilous and always frivolous chorus of charges against Kolner and Ray has required many

long hours of attorneys' time and multiplied the stress of conducting a busy immigration practice. Enough is enough! It is time to put a stop to it all, and you are where the buck stops.

Specific Constitutional violations resulting from EOIR retaliation. The retaliation shown herein violates my First Amendment rights and my duties to vigorously represent my clients, and my First Amendment rights to complain about EOIR judges who violate the law, the Constitution, as well as my clients' Sixth Amendment right to counsel, and Fifth Amendment rights to due process fair hearings.

There appears to be an illegal conspiracy operating out of the MIC. One final thought: the law is pretty clear that when two or more persons act in an unlawful manner with the same goal of harming another person, such actors are deemed a conspiracy, and each member of such conspiracy is responsible not only for his/her own actions but is responsible for every act of every other member of the conspiracy. As lead counsel for *Loranger v. Stierheim, et al.*, 3 F.3d 356 (11th Cir. 1993), where a federal jury found the $160,000 + a year county attorney, two of his assistants, county executives and others running the five-million dollar a year operation liable for conspiring to "get" Loranger under of color of law, I do have some credibility and expertise in this area, so I do suggest you consider in this light what your people are doing as shown in the above chronology.

What I am asking you as Chief Judge to do; my simple request. Please get these people off my back. My only desire is that the MIC:

1. give a fair hearing by not constantly turning off the tape recorder or refusing to turn it on to hide whatever it is they are so determined to hide;

2. allow attorneys to state objections for the record, and

permit them to make appropriate motions as constitutional due process requires;

3. stop misconstruing my legal arguments against their rulings or conduct as an attack upon their integrity; and

4. stop the resulting retaliation against Kolner and me.

That is all I ask. The refusal of your judges to conform to these fundamental legal principles is the cause of all this unnecessary and destructive conflict.

To show you I harbor no grudge, I thought I would end this in a lighter vein, so you might relax and join my efforts to put all this foolishness to rest. There is no mystery about all this judicial storming when you consider a likely psychological source for your Judges' complaints about Kolner's "body language" and "tone of voice" which is explained in a standard college text:

> The peck order is established by a set of encounters between pairs of chickens who peck at each other in a restrained fashion. Each encounter eventuates in a victor and a vanquished... Two hens or roosters often establish a dominance relation without battle, simply on the basis of their comparative size, vigor, and, if we may anthropomorphize, signs of "confidence". One of the hens may lower its head in a gesture of submission that inhibits attack... Among chickens, the order of precedence once established is likely to last their lifetimes, and further contests generally do not occur. Although aging despotic hens or roosters are sometimes the objects of revolt from below, the fierce display they put on and the habit of deference in their juniors may enable them to retain their rank

> as long as they live.
> Pecking will also occur and is especially savage whenever a chicken "forgets its place" and usurps the rights of a higher-ranking bird (emphasis added).

"Rank", *Psychology*, Brown, Herrnstein, Harvard University, Little, Brown and Company, Library of Congress Catalog Card No. 74-2031, Second printing, p.222.

If you can just get these judges to follow the law as explained above I can assure you that the complaints about lawyer Kolner and me will cease. There will be no need to keep "the ever-growing file" on lawyer Kolner described by Judge Keith Williams in his recent memo to you. We can put an end to all these arguments and diversions and get on with the work of the court.

Thank you for your time and attention.

Sincerely,

/s_____
Michael D. Ray

MDR/ch

Michael D. Ray
Lawyer

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November 14, 1996

Michael J. Creppy, EOIR Chief Immigration Judge
5107 Leesburg Pike
Falls Church, VA 22041

Re: Emergency request for recusal of EOIR Judge P. Montante in all cases involving lawyers M.D. Ray & N.D. Kolner

TRANSMITTED BY FACSIMILE

Dear Judge Creppy:

Deep appreciation best describes my reaction to your taking my emergency call Friday afternoon, November 1, 1996 about Miami EOIR Judge Philip J. Montante's going off the deep end of judicial limits in pursuit of his personal vendetta against lawyers Neil Kolner and me, and transferring our call to your lawyer, Bill Joyce, who immediately tried to get to the bottom of the issue. It was gratifying to hear him ask all the right questions.

Calling the armed guards. It is also gratifying to know that you, the Chief Judge, can be reached immediately in such a

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scary situation where a raving Judge who has falsely defamed Kolner and me in the media and in an Order of the EOIR Court, called armed guards to remove us from what he calls "his" courtroom, and blithely done so without a shred of reasonable grounds or lawful authority.

Nature of the emergency. The evidence shown herein, including the attached exhibits and the official hearing tape, shows that if and when I am forced to appear before Judge Montante this Friday, November 15, 1996 (strangely set with 3 days notice instead of the 14 days required by law) or any other day that there exists a strong likelihood that Judge Montante will again have me removed from the Courtroom by armed guards and/or arrested when in order to represent my client I will be forced to ask for Montante's recusal and attempt to state the grounds for my motion, i.e., Montante's vendetta against Kolner and me, his dishonest, illegal, Unconstitutional conduct, falsehoods about me on and off the bench (some to the media) and the facts supporting those allegations.

I feel certain that after you obtain the recording of the hearing as Bill Joyce indicated he would, when you recover from your shock at what you hear Montante say, you will see to it that neither Kolner nor I will ever have to appear before Montante again - and better, perhaps, no one else will have to appear before him.

The implications. I am sad to say, and I do not mean to offend you, but I must speak the unspeakable if I am to put Montante's judicial intimidation in context so you can understand the gravity of what this man is doing to the American concept of justice and the reputation of EOIR before lawyers and the legal press. Montante's trial conduct

towards Kolner and me (and who knows how many other attorneys afraid to speak up?) is just one more discouraging example of judicial railroads, kangaroo courts, lynchings, Inquisitions, Salem Witch Trials, Star Chambers, and Nazi Justice rearing their heads like a plague in humankind's struggle upward through history. I make this unpalatable charge simply because only you, not I, have the obligation and lawful authority to exercise that obligtion to put a stop to Montante's abuses.

The official record of the hearing. The tape recording made by the Judge will corroborate our allegations that in the mindless pursuit of his vendetta against us Montante, in an EOIR hearing, has thrown overboard the U.S. Constitution and the Code of Federal Regulations. As the record will show, Montante's official conduct was so abhorrent to the democratic process and codes of judicial conduct that at the least he should be permanently removed from any hearings where Kolner or I are counsel of record. Ideally, Montante should be removed from the EOIR bench as you will discover to your dismay when you listen to the hearing.

Specific and particular facts in support of my conclusions above surrounding the November 1, 1996 hearing before Judge Montante:

1. That Montante refused to allow Respondent to state grounds in support of his motion to recuse;

2. That he refused to rule on the motion to recuse prior to proceeding with the hearing while allowing the Government a chance to respond to the motion, even though the judge would not let the motion or grounds be stated on the record.

3. That he capriciously ruled the motion to recuse was not legally authorized because it had not been filed in writing at

least fourteen days before the hearing, in spite of the fact counsel Ray repeatedly informed the judge that Ray had only been hired the night before the hearing.

4. That he several times arbitrarily ruled incorrectly, contrary to basic law and counsel Ray's protests, in effect that the rules prohibit oral motions to recuse (!), the most reasonable inference being he substituted Montante's law for the law of the land in order to supress damning evidence against him of judicial misconduct contained in Ray's motion to recuse and documents in support thereof.

5. That from the bench he made several alarming, damaging, and false accustions against counsel, i.e, (I) that Ray was contemptuous for making a motion to recuse and for insisting on stating the grounds for the record, (ii) that Ray had a history of repeatedly disrupting courtrooms and exhibiting contempt, (iii) that Ray refused his order to leave the courtroom - before he had ordered him to do so, (iv) that Ray had refused to proceed on the case when in reality all counsel had said was that he was not "ready" to proceed since he had just been hired the night before.

6. That he arbitrarily refused to continue the case set for master calendar in spite of the fact counsel had been hired only the night before.

7. That he ordered counsel for Respondent to leave the courtroom while threatening that if the client left the courtroom he would proceed in absentia.

8. That after ejecting Respondent's counsel he warned Respondent himself that he would not permit Kolner or Ray to represent him and therefore, was continuing Respondent's case until April, 1997, so Respondent would have time to find other lawyers because Montante would not permit Ray or Kolner to represent Respondent in "my" (Montante's)

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courtroom.

9. That he kept referring to some mysterious "group" that seemed out to get him (in the manner of a paranoid delusion), i.e. (I) that he arbitrarily ejected at least one spectator from the public hearing whom he labelled as part of "the group" after demanding to know who one of them was and claiming it was "his courtroom" as his source of authority, (ii) that he scolded another spectator who had not said a word - as she was walking out the door(!) - that she, too, would be removed from the courtroom if she were disruptive, and called her a member of the "the group", (iii) .that he ordered the guards to not let any members of that "group" back into the Courtroom; Montante never did not say who was in the group he was afraid of or prejudiced against or identify it in any other way and (iv) that he stated something to the effect that he knew that I had witnesses in the courtroom and that I thought he would be intimidated by them.

10. That he ordered counsel Ray to sit down and speak no more while Ray was stating the first of his three grounds for recusal, while walking back to his table from the government attorney's table after providing the government attorney with Ray's notice of filing exhibits in support of his motion for recusal and supporting documents; when Ray didn't respond fast enough, Montante growled a second order to sit down, using a tone expected in an institution for retarded juvenile delinquents.

Listed below are the grounds which Montante would not allow on the record for Ray's motion to recuse him. Counsel attempted to allege that Judge Montante was so prejudiced and/or biased against lawyers Ray and Kolner that a reasonable person being advised of the premises would believe that Montante would not give a fair trial to their

clients. (See attached Declaration of Paul Ajuwa, Ray and Kolner's client terrorized by Montante's calling the guards and the police to remove them from the courtroom).

1. That in a previous hearing involving a different client Judge **Montante falsely and with malice accused counsel Ray in a written order**:

> The Court also takes judicial and/or administrative notice of the fact that the United States Chief Immigration Judge has reprimanded and/or admonished counsel in writing because of ongoing unprofessional conduct in the Courtrooms of a number of Judges in the the United States Immigration Court in Miami, Florida.

In the Matter of Clomene Estime, A72 036 558, June 26, 1996; (Emphasis in original).

When Ray wrote to Montante demanding a retraction of this false and vicious defamation, Montante failed to respond.

2. That Montante's prejudice against lawyers Ray and Kolner was also quoted in the official newspaper of record in this community of 2 1/2 million, the *Daily Business Review*, wherein Montante (through his attorney was quoted as saying) that Ray and Kolner were part of yet another group - this time of so-called "chronic troublemakers". The source of the quote was Montante's lawyer defending Montante against a suit for libel by Ira Kurzban, nationally known Haitian advocate, author, lecturer and standard immigration legal text author, also a member of one of Montante's inimical "group[s] of chronic troublemakers".

3. That in response to a story in the *Daily Business Review*

quoting Ray as saying Montante's refusal to grant political asylum to Haitians surely indicated prejudice, the Review reported that Montante's attorney denied that Montante was prejudiced against Haitians because he had granted "numerous" Haitians asylum. Montante's denial was false to the core.

4. That Ray wrote both Montante and his lawyer a demand for retraction for this second scurrilous falsehood, this time suggesting Ray had lied to the press, but this, too, went unanswered by Montante and evoked a response from Montante's lawyer threatening to sue Ray.

5. That when Montante's lie to the Review defaming Ray was exposed the lie cost taxpayers $24,941 to pay Ray's private attorney general fees (Fees were awarded by the U.S. District Court because after Montante's libelous comment published in the *Review* article implying that Ray was not truthful about Montante's prejudice against people of color, particularly Haitians, because Montante would not grant them asylum, Ray filed a Freedom of Information Act (FOIA) request with EOIR for the official record showing how many Haitian asylums Montante had granted. The EOIR refused to give Ray the number. Ray sued EOIR for the information. Ray won the FOIA lawsuit, thus EOIR was ordered to answer Ray's question and to pay his attorney's fees for his trouble. Contrary to the Montante lie calculated with such guile and deceit to destroy Ray's credibility via the *Review* article, ***inter alia***, the truth was that Montante had granted only one, repeat one, Haitian asylum - not the "numerous" Montante Haitian asylums falsely claimed.

6. That Montante's defamatory lie about Ray to the Daily Business Review was reported in a follow up article ridiculing EOIR Judge Montante, apparently contributing to Montante's

seeking revenge against Ray and Montante's campaign from the bench in furtherance of his personal vendetta against all members of the hated "group" - Montante's symbolic Germanic "final solution" for members of Ray and Kolner's conjured up "group"

The reputations of EOIR, Ray and Kolner have been held up to scorn and ridicule by Montante's personal vendetta conducted through Montante's abuse of his official position. More than a dozen attorneys in the building (where EOIR, U.S. Immigration, and I have my office), employees of EOIR, U.S. Immigration employees, assorted guards, secretaries, and so on have told me they saw the flashing lights on the police car sitting in front of the building (apparently as a result of Montante's phone calls interrupting the hearing and requesting emergency assistance) and wondered if I had been arrested because of some trouble with a Judge. Why they wondered if it were I is not known to me. You certainly do not need me to draw conclusions from these facts for you regarding the havoc to everyone's reputation by this man.

Attached hereto are the documents I unsuccessfully sought to admit at last Friday's hearing which would indicate to any reasonable person that Judge Montante may not have the ability and/or inclination to be fair on almost any case before him where people of color seek relief and/or where Michael D. Ray or Neil Kolner are counsel. Based on the above outline it might even be fair to say that to claim otherwise is either ridiculous, outrageous, dishonest - or perhaps all three.

In conclusion, based on the above, Kolner and I ask for ourselves only that you as Chief Immigration Judge make sure neither of us must ever appear before Judge Montante again, and particularly at 9:00 a.m. this Friday, November 15, 1996

in the case of Lucienne Laroche, Case no. A70 573 387.

Finally, in the interests of justice and to prevent expansion of the disrepute into which Philip Montante involves (I) EOIR and the judicial system by his conduct unbecoming a judge as reported by the *Daily Business Review*, and outlined above, (ii) attorneys who practice before that court, (iii) the profession of law itself, we solemnly urge you to exercise your authority to remove Philip J. Montante from the bench.

Thank you again for your time, attention, and help.

Sincerely,

/s_____
Michael D. Ray

MDR/ch
enclosures

Michael D. Ray
Lawyer

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Miami, Florida 33130
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CERTIFIED RETURN
RECEIPT #P 228 020 389

August 19, 1997

Michael J. Creppy, Chief Immigration Judge, EOIR
5107 Leesburg Pike, Suite 2545
Falls Church, Virginia 22041

Re: 1. Demand for retraction pursuant to Fla.Stat. S.770.01 (1995) 2. EOIR retaliation and chilling of First Amendment Rights against whistleblowers by (i) libel and defamation; (ii) other downright lies; (iii) threats; (iv) intimidation; (v) incompetent Bar complaints; (vi) whitewashes, coverups, fake "probes", "inquiries" and "investigations" (vii) **the harassment must stop**

Dear Judge Creppy:

Pursuant to Fla. Stat. S.770.01 demand is hereby made that you retract the false and damaging information about me contained in your letter to me and to lawyer Neil Kolner of July 18, 1997 which you published to at least a dozen known recipients. Your false allegations in this letter are:

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1. That I "refused to speak with Michael Straus, [your] legal counsel whom I sent to conduct this probe".

(*Your assistant Straus's* retraction of *your* false statement in his letter of July 31, 1997 is insufficient. That tactic passes the buck to Straus, makes him the scapegoat, and bestows deniability on you. *You* signed and published the letter containing the libel, therefore, only you can retract it. That is what I demand. Furthermore, the Straus letter of retraction contains another assertion as false and libelous as that which he retracts!, i.e., that I ever refused to meet with him).

2. That "there have been several occasions where [my] conduct during immigration proceedings has been inappropriate and disrespectful to both the Court and the process itself."

3. That I "refused to comply with Judge's requests".

4. That on one occasion I "physically [threw] a book in open court".

4. That I "should cease and desist from this discourteous conduct immediately".

5. That your office "has made every attempt to address [my] concerns as fairly and expeditiously as possible."

In an attempt to salvage my reputation in the eyes of all those to whom you published your crazy caricature of me (07-18-97), and upon whom my ability to survive as a lawyer depends, I will now respond to your false charges with copies to all who received your libel about me. I have searched this calumnious letter of yours for a grain of truth about me and about my conflict with your office. I have searched in vain.

In limine, **Retaliation by the Miami Immigration Court must stop** was the "Re" line of a ten (10) page letter and report you received from me on or about February 25, 1996

(copy enclosed herewith). **I requested you to halt four wrong practices indulged in by by just a very few of the Miami Immigration Court Judges, i.e.:**

> "1. Give a fair hearing by not constantly turning off the tape recorder or refusing to turn it on to hide whatever it is they are so determined to hide;
>
> 2. Allow attorneys to state objections for the record, and permit them to make appropriate motions as constitutional due process requires;
>
> 3. Stop misconstruing my legal arguments against their rulings or conduct as an attack upon their integrity; and
>
> 4. Stop the resulting retaliation against Kolner and me."

In response to that letter, ***inter alia***, you sent your lawyer, Bill Joyce, and your assistant Chief EOIR Judge, Brian O'Leary, from Falls Church, Virginia to Miami to meet with lawyer Neil Kolner and me to discuss our grievances. We spent close to an entire afternoon in conference. **You fixed the first three problems I had complained of immediately, and I have thanked you many times for that. Little did I know that soon you would be jumping on the number 4 bandwagon to join your gang in harassing Kolner and me to the point of publishing the libel I now demand you to retract.**

Now these three wrong judicial practices you stopped at my behest - gross violations of the Constitution - were obviously wrong or you would not have taken such quick action to stop them. It cannot therefor be anything but wholly dishonest for you to subsequently publish a letter in Miami's legal newspaper, The Miami Review, saying that none of your judges have done anything

wrong.

Just as it is thoroughly dishonest for your 07-18-97 letter to accuse me of professional misconduct in EOIR court when just a few months ago EOIR wrote me that no judge had ever complained about me in all my years before them. Your personal attack against me in your 07-18-97 letter constitutes hallmark retaliation of a vendetta conducted under color of law.

The genesis of your libel, your "reports" and your "probes". This brouhaha all began of record with an article in Miami's newspaper of record. The Daily Business Review, in an article headlined, "Immigration judge, lawyer in ongoing, ugly feud; For more than three years, hostility in and out of court", Friday, April 15, 1994. The article mostly described a dispute between Judge Montante and Ira Kurzban, "a prominent member of South Florida's immigration bar and an adviser to exiled Haitian president Jean Bertrand Aristide." The story also quoted unwarranted remarks by Montante slinging mud at lawyer Neil Kolner, and me

The Review reported that **"Kurzban sued Montante in 1991 for allegedly bad mouthing him to other lawyers as unprofessional and unethical", similar to your, your assistant's, and Montante's libel of me.** Headings under the *Review* photographs note that "Immigration judge Philip J. Montante has criticized Kurzban for 'intemperate and disrespectful conduct, frivolous or dilatory trial tactics' and 'false accusations and/or misleading statements'". Has a familiar ring!

"Miami lawyer Ira Kurzban is suing Montante for defamation: **'I'm not going to sit by and let somebody ruin my reputation out of vindictiveness'"**. Here we go again! "Miami criminal defense attorney Joel Hirschorn: Montante allegedly made remarks to him describing Kurzban as

unprofessional and unethical". Apparently a standard EOIR line. Despite the pending litigation, Montante won't disqualify himself from two cases Kurzban still has before him (emphasis added)." SOP for EOIR as we will see.

And the next year, *The Miami Review* printed a similar story, "Immigration lawyers get evidence against judge", Friday, May 12, 1995, p.A14 which reported my Haitian client's and my belief that Miami Immigration Judge Phillip J. Montante was biased against her because she was Haitian. "'Nonsense' responded a lawyer for Montante, John McLuskey. He told a Daily Business Review reporter the judge had granted asylum to numerous Haitians. That was in April 1994." Ibid.

In accordance with your expressed conviction, which has always been my own firm belief, that "any trial or hearing is essentially a search for truth and justice, any behavior that diminishes this objective is inappropriate" (your July 18, 1997 letter), I filed a Freedom of Information Act (FOIA) request to your office asking how many political asylums of record judge Montante had granted to Haitians.

EOIR failed to answer my Freedom of Information request within the time mandated by statute, so I sued your office in U.S. District Court to expose your ugly secret and to learn the truth. The District Court ordered your office to release to me the information I had requested and to pay me over $24,000.00 in attorney's fees.

The humiliating information EOIR had attempted to conceal from me and the public in your and EOIR's ever so admirable "search for truth and justice" disclosed that at the time of Montante's claim to *The Miami Review* of his generosity in the matter of Haitian asylums he had supposedly granted, the truth - EOIR and Montante's secret - was that

he had granted only one Haitian political asylum (on July 10, 1991), certainly a far cry from the face-saving disinformation he passed out to the press to discredit me and to hide his disgraceful record from the public he supposedly serves - by now becoming the badge of EOIR in this matter.

This little drama exposing the craven mendacity of Judge Phillip Montante fits right in with your avowed goal of "engender[ing] the public respect that allows the Court system to work" - precisely why you wrote *The Review* for publication that none of your judges had "done anything wrong". This drama also engendered another report in *The Miami Review*. On 12-5-96 The "Bar Talk" column by *Review* Staff, "Immigration judge's removal sought in long-running feud", apparently being the catalyst for your letter to the *Review* which it published wherein you repeated your refrain that none of your judges had done anything wrong. After *The Review* published Montante's picture along with one story he grew a mustache to change his appearance even though you trumpet to the world Montante did nothing wrong.

Judge Montante broadened his campaign of retaliation against me after *The Miami Review* stories exposing him as a cowardly liar. Once in 1997 - before even asking me to leave "his" courtroom as he called it - he called armed guards into the courtroom to throw me out, and after I had left he told my terrorized client that he (Montante) would not let me practice before him, that my client would have to hire another attorney, and then gave my client a list of names of other attorneys. But even after this judge Montante still denied all my motions to recuse him for bias. So did you. SOP for EOIR. Same game plan for Kurzban.

After all, as you keep repeating, None of your judges have done anything wrong.

Although you have never contested a single fact I have sent to you in an inch high pile of correspondence and supporting documents, you again unblinkingly ratified this kind of judicial conduct by the publication of your letter in *The Review*, reassuring its readers that "None of" your judges "had done anything wrong". Thus, this kind of judicial conduct must be the ideal you were referring to when you said, "It is the image of professionalism, competence and dignity that fortifies the quest for the truth" and how such conduct on the bench also "engenders the public respect that allows the Court system to work". And another example receiving your *imprimatur* would be the time Judge Williams suddenly jumped up from the bench in the middle of a public hearing, ended it with the words, **"I don't need to put up with this shit", and stalked out of the courtroom.**

After you received the mass of uncontested evidence I sent you supporting my complaints, your July 18, 1997 letter ignored it all. Says that your "office has concluded our inquiry into the allegations [I] raised regarding the conduct of Immigration Judges in Miami as well as [my] conduct before the Immigration Court. Based on this 'investigation', I have not found sufficient evidence of misconduct by any Miami or Krome Immigration Judge to warrant administrative action." **Could this be an attempted whitewash by the office of the Chief Judge of EOIR? - its own little Watergate, Irangate, Miami INSgate, Valuejet-FAAgate, etc. etc., *ad infinitum*?**

Even more curious is judge Montante's refusal to recuse himself in subsequent hearings where I was scheduled to appear before him. You, too, more than once refused to issue a blanket order of recusal of judge Montante I requested from you.Same game plan *The Review* reported EOIR used against expert immigration lawyer Ira Kurzban. Instead of recusing

himself, **at hearings I had scheduled before Montante, after my clients and their witnesses had taken time off from work and come to Miami for their hearing, judge Montante would not hear their case** for one "reason" or another. In your lexicon such subterfuge and lack of sensitivity for other members of the human race "engenders the public respect that allows the Court system to work".

On one such day judge Montante heard several cases, but when my case was set for hearing a sign mysteriously appeared posted in the clerk's office saying he was gone. **Damn the hardship to the parties - another example of your method to "engender the public respect that allows the Court system to work"** that you were teaching me about. Later that same day a colleague reported he saw judge Montante on the street. I guess this deceit of Montante's is another example of what you meant in your July 18, 1997 letter to me by your lesson, **"I would also remind you that professional conduct and behavior is essential to the administration of justice and to the management and control of the courtroom."**

Another of your "investigations" you told me about was in response to a 3 page letter I wrote you on December 14, 1995, "Re: Nancy McCormack; request for removal as EOIR hearing officer for misconduct by her willful, wanton, habitual violation of EOIR Rules and Constitutional due process; and for rude, insulting malicious attacks upon counsel". Neither you nor anyone else has contested the facts with which I supplied you about this episode, therefore you should give Judge McCormack a promotion for her loyal demonstration of the principle you espouse in your words, "Since any trial or hearing is essentially a search for truth and justice, any behavior that diminishes this objective is inapproproate.The paragraphs of this letter were headed by a precis of the

evidence supporting my charges in the "Re" line of my letter, e.g., (i) Violations of 8 CFR s. 242.15; (ii) Tampering with the record; (iii) Due process violations; arbitrary and capricious conduct; (iv) Rude, irrational and inappropriate personal attacks; (v) Conduct unbecoming a judge; 3 additional examples; (vi) Proof of allegations against Nancy McCormack; (vii) Additional corroboration of my allegations; (viii) More contempt for the U.S. Constitution & 8 CFR s. 242.15; (ix) The intentional concealment and/or destruction of evidence. Your response? "None of my judges have done anything wrong.

In furtherance of your nobly expressed "quest for the truth" you had not bothered to even answer my 12-14-95 McCormack letter for six weeks, so I sent you a follow-up letter again requesting your response. The postal receipt for my follow-up letter (P121 458 505) was finally signed for by your office on February 1, 1996. Some time later I received your reply. It was dated January 30, 1996.

Your reply totally ignored every single allegation of misconduct except one - that judge McCormack had intentionally garbled the taped record of the proceedings. Then you blithely wrote, "You. also raise other allegations concerning Judge McCormack's conduct in immigration proceedings. These allegations are made in support of your concerns expressed in the Metalus case. Since I believe that those concerns have been addressed, I will not respond to these other allegations."!

Contrariwise, the fact is that you addressed not one of my other concerns. Not one.

Next, apparently in reckless disregard of the obligations of your position you returned the original of my complaint to me with the "received" stamp of your office clearly on it.

Contrariwise, a memorandum for you from Anthony C. Moscato, Director of EOIR, dated February 27, 1995, titled "Allegations of Misconduct or Impropriety Processes", says the following in relevant part:

"The purpose of this document is to describe the process by which allegations of misconduct or impropriety made with regard to... Immigration Judges... shall be handled.

"...such allegations may be forwarded by mail or telephone to... the Chief Immigration Judge... **Upon receipt, these allegations will be forwarded to Counsel for Office of Professional Responsibility** [emphasis added].

I infer that your refusal to act in accordance with Director Moscato's instructions to you constitute your grounds for advising me that "[i]t is this image of professionalism, competence and dignity that fortifies the quest for the truth. All attorneys and parties appearing before any Court would do well to remember that fact."

In conclusion, not one of your allegations against me of what amounts to professional misconduct is based on fact. Instead, you render grand conclusions, vague generalities, bizarre caricatures, and irrelevant alien number string cites all based on falsehood, and all out of context. Nevertheless, **you chose to publish this rubbish to every government and judicial official you could think of who could make my life miserable or even perhaps take away my right to earn a living as an immigration lawyer.**

The malice of your personal vendetta is made even more grave when coupled to the fact that as you well know The Florida Bar recently dismissed a similar complaint filed against lawyer Neil Kolner by Miami Immigration Judge Nancy McCormack with what it would be fair to describe as The Bar's denigrating observation on the substance of

~~McCormack's unprofessional and/or incompetent~~ malevolence. **As explained thoroughly in more than one of my letters to you, your determination to silence my criticisms of judicial conduct by four of your EOIR judges which is in outrageous opposition to the First and Sixth Amendments among other principles of law, fair play and honesty, makes you equally responsible for the retaliation and whatever other consequences may occur.**

Finally, pursuant to Florida Statute you have ten days to retract your scurrilous comments libelling me.

PLEASE GOVERN YOURSELF ACCORDINGLY.

Sincerely,

/s_____

Michael D. Ray

MDR/ch.mdr\eoir\08-19-97a

cc:

Anthony Moscato, Director, Executive Office for Immigration Review

Michael Straus, Counsel to the Chief Immigration Judge

Gail Padgett, Assistant Chief Immigration Judge

Michael Ringstad, Court Administrator

All Miami and Krome Immigration Judges

Peggy Philbin, General Counsel

Enclosure: February 23, 1996 letter of 10 pages to Chief Judge Creppy from Michael D. Ray, re "Retaliation by the Miami Immigration Court must stop"

IN THE SUPREME COURT OF FLORIDA
BEFORE A REFEREE
FLORIDA BAR CASE NO. 94,433

THE FLORIDA BAR, Petitioner,
vs.
MICHAEL DEAN RAY, Respondent.
_____/

EXCERPT OF PROCEEDINGS

The above-entitled cause came on for trial before the Honorable Gerald Hubbart, Judge of the above-styled Court, at 175 Northwest 1st Avenue, Miami Florida, on August 10, 1999, commencing at 2:00 o'clock p.m., pursuant to Notice.

APPEARANCES:

THE FLORIDA BAR
444 Brickell Avenue
Miami, Florida 33131
By: RANDI KLAYMAN LAZARUS, ESQ.
On Behalf of the Florida Bar

NEIL KOLNER, ESQ.
155 South Miami Avenue
Miami, Florida 33130
On Behalf of Respondent

EXHIBIT
"D"

EXCERPT

* * * *

THE REFEREE: All right. on the evidence presented here, the evidence presented here more then sustains the complaint filed by the Florida Bar here.

The letters contained accusations which are utterly false and they were made in my way of thinking at a minimum – at a minimum – with a reckless disregard for the truth.

Indeed, if there is one word that characterizes these letters, it is reckless.

I mean, one of the "lies" told by Judge Montante turns out to be a statement he never even made. I don't know how you could possibly call someone a liar for a statement they never made.

And while the affidavit of Mr. Ray's client at the November 1st hearing of 1996 is of interest, I must rely on not that but rather on the tape recording I have heard and on the transcript of the proceedings.

In the February 23rd, 1996 letter to Michael Creppy, the Respondent makes reference to Judge Montante's cowardly deceit.

I have heard no evidence – and the evidence is indeed is quite to the contrary that Judge Montante was not guilty of any deceit, cowardly or otherwise.

Quoting further from that: "Montante's shameless lies--" on page three of that letter. Once again, no competent evidence before this Court to show that he engaged in any kind of lies, shameless or otherwise.

And the statement phrased as a question to the effect that Judge Montante was tampering with the record once again is a statement that was false and has been made with reckless disregard for its truth.

I see no competent evidence before me to show that Judge Montante was guilty of any mendacity, craven or otherwise, or that he was a liar, cowardly or otherwise, which was alleged in the August, 1997 letter.

Now, dealing specifically now with the letter of November 14th, 1996, that letter I am finding specifically was occasioned by the hearing of November first. And referring to that November first hearing, the Respondent wrote:

"Montante's trial conduct where Kolner and me and who knows how many other attorneys are afraid to speak up is just one more discouraging example of judicial railroads, kangaroo courts, lynchings, inquisitions, Salem witch trials, star chambers, and Nazi justice rearing their heads like a plague in humankind's struggle upward through history."

That language was meant to state that the November first hearing was one more discouraging example of judicial railroads, kangaroo court, lynchings, inquisitions, et cetera.

I have read that transcript and I have listened to the tape, and there was nothing – nothing – that transpired in that hearing that would justify such outrageously false accusations. And I am just utterly appalled that this kind of language would be used against anybody on evidence that barely even qualifies as sketchy.

I am going to sustain the complaint. The punishment I will recommend that the Supreme Court impose in this matter would be that there be a public reprimand and that costs be awarded to the Florida Bar.

Counsel, why don't you prepare a proposed report for me and send a copy over to counsel and I'll take a look at it.

(Thereupon, the trial was concluded at 3:10 P. M.)

CERTIFICATE OF REPORTER

STATE OF FLORIDA)
) ss.
COUNTY OF DADE)

I, CAROLE BERNARD BECKER, a Notary Public in and for the State of Florida, do hereby certify that I reported the foregoing hearing at the time and place hereinabove set forth; and that the foregoing pages numbered from 1 to 6, inclusive, constitute a true and correct transcription of a portion of my shorthand report of the hearing.

WITNESS MY HAND AND SEAL in the City of Miami, Dade County, Florida, this 11th day of August, 1999.

/s_____
CAROLE BERNARD BECKER

APPENDIX C

Supreme Court of Florida

MONDAY, OCTOBER 1, 2001

CASE NO.:SC94433
Lower Tribunal No.: 98-70,862(11K)

THE FLORIDA BAR vs. MICHAEL DEAN RAY

Petitioner(s) Respondent(s)

Respondent's Motion for Rehearing and Clarification is hereby denied.

WELLS, C.J., and SHAW, HARDING,, PARIENTE, LEWIS, and QUINCE, JJ., concur.
ANSTEAD, J., dissents.

A True Copy
Test:
/s_____ [Seal of Florida Supreme Court]
Thomas D. Hall
Clerk, Supreme Court

bhp
Served:
HON. GERALD D. HUBBART, JUDGE
RANDI KLAYMAN LAZARUS
NEIL KOLNER
EUGENE SHY, JR.

ANDREW NEEDLE
JONATHAN P. ROSE
TAMMY FOX-ISICOFF
JOHN ANTHONY BOGGS